

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 SOUTHERN DIVISION

4 * * * * *

5 Civ. 04-04200

6 DONALD E. MOELLER,

7 Plaintiff,

8 -vs-

9
10 DOUGLAS WEBER, Warden,
11 South Dakota State Penitentiary,

12 DENNIS KAEMINGK, Acting Secretary
13 in His Official Capacity as
Secretary of Corrections,

14 DOES 1-20, Unknown Employees or Agents
15 of South Dakota Department of Corrections,

16 Defendants.

17
18 U.S. District Courthouse
19 Sioux Falls, SD
20 October 22, 2012
10:30 a.m.

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22 H E A R I N G

23 * * * * *

24 BEFORE: The Honorable Lawrence L. Piersol
U.S. District Court Judge
Sioux Falls, SD
25

1 APPEARANCES:

2 Mr. Mark F. Marshall
3 Bangs, McCullen, Butler, Foye & Simmons
4 PO Box 2670
5 Rapid City, SD 57709

6 for the Plaintiff

7 Mr. Robert W. Van Norman
8 Nooney Solay & Van Norman
9 PO Box 8030
10 Rapid City, SD 57709-8030
11 (appearing by videoconference)

12 on behalf of Donna Nichols

13 Mr. Marty J. Jackley
14 Mr. Paul S. Swedlund
15 Attorney General of South Dakota
16 1302 E. Highway 14 Suite 1
17 Pierre, SD 57501-8501

18 for the Defendants

19 ALSO PRESENT: Donald E. Moeller
20
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23
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25

1 THE COURT: Good morning. Appearances first for
2 Donald Moeller and his counsel.

3 MR. MARSHALL: Good morning, Your Honor. I'm
4 Mark Marshall. I appear on behalf of Donald Moeller.

5 THE COURT: Let the record reflect Mr. Moeller is
6 also present here in Court.

7 Then Mr. Van Norman, as claimed next friend, your
8 appearance, please.

9 MR. VAN NORMAN: Thank you, Your Honor. Robert
10 Van Norman on behalf of Donna Nichols, who appears or would
11 appear on behalf of Mr. Moeller.

12 THE COURT: Is Ms. Nichols there with you?

13 MR. VAN NORMAN: No, she isn't, Your Honor. I
14 talked to her Saturday, and since I anticipated not being
15 able to be in Sioux Falls, she decided and I advised her
16 not to appear in the Courthouse in Sioux Falls without
17 counsel, and I couldn't find anybody to accompany her.

18 THE COURT: Does she live in Sioux Falls?

19 MR. VAN NORMAN: Yes, she does, Your Honor.

20 THE COURT: All right. Then for the Defendants?

21 MR. JACKLEY: Good morning, Your Honor.
22 Marty Jackley, South Dakota Attorney General, and
23 Paul Swedlund, South Dakota Assistant Attorney General.

24 THE COURT: Well, I scheduled this hearing after
25 Mr. Van Norman appeared first for Mr. Semmerling, but then

1 amended that one so appearing for Ms. Nichols as a claimed
2 next friend. Of course I've read your papers,
3 Mr. Van Norman. What would you like to say?

4 MR. VAN NORMAN: Your Honor, I think much of what
5 I might say has already been said, so I won't burden the
6 record with that. I'm referring to both the presentations
7 at the hearing earlier this month at which time the Court
8 examined Mr. Moeller.

9 There have been a plethora of documents submitted,
10 both before and after that hearing, by the Arkansas Federal
11 Defender's Office, many of which don't need to be recited
12 here. The statements in those documents are, I believe,
13 self-explanatory with regard to the positions taken at that
14 time. I would renew those positions.

15 I would also like to introduce Donna Nichols further
16 to the Court via my statement. I have interviewed her
17 first in 1997 during the time of Mr. Moeller's retrial.
18 She lived in Rapid City at that time. At that time I had
19 also interviewed Agnes Becker, Mr. Moeller's stepmother, on
20 a number of occasions, both in Sioux Falls and later by
21 telephone as I was involved in that prior trial litigation.

22 I have again, and also has my legal assistant,
23 interviewed Donna Nichols in the past 10 days on a couple
24 occasions, as I alluded to earlier. Ms. Nichols has a lot
25 of information, in large part via Donald Moeller's

1 stepmother, Agnes Becker, who also filed a Declaration,
2 which I'm referring earlier, asking that she be admitted or
3 appointed as guardian ad litem.

4 Those are the bases, generally speaking, on which I
5 appear on behalf of Ms. Nichols for Donald Moeller as next
6 friend. The point being that the sudden change, according
7 to the family, Ms. Nichols and Ms. Becker, of Donald's
8 desire to continue to fight for himself, has led them to
9 the belief that he is not making rational decisions.

10 I have reviewed, of course, the hearing transcript
11 from the last hearing, I believe that was October 5, and I
12 am obviously mindful of what the Court's conclusions were
13 previously.

14 With regard to Ms. Nichols as next friend, I believe
15 she meets the legal standard.

16 That would be the first point or set of points I would
17 wish to make for the Court at this time.

18 THE COURT: Well, Mr. Van Norman, as you know,
19 because, of course, you were at one point the head of the
20 Federal Public Defender's Office in South Dakota, and
21 you've been before me before, and you know I don't just sit
22 here, but I often ask counsel questions.

23 So one of my questions is this Declaration by
24 Ms. Nichols is dated January 16 of 2012. In passing, I
25 note that it's not notarized. Aside from that, though, in

1 that I don't see anything where it says Mr. Moeller doesn't
2 know what he's doing, that he's not of sound mind, or
3 anything of the sort. It's just generally a statement of
4 support for him.

5 MR. VAN NORMAN: Yes. That's exactly correct,
6 Your Honor. In large part, because of my unavailability.
7 I was out of town working via electronics. I can represent
8 to the Court what she's said, and I have already done that,
9 as an officer of the Court, but I believe as stepsister to
10 Mr. Moeller and her long association with Mr. Moeller, as
11 more fully indicated in the Declaration to which you refer,
12 I believe she can stand as next friend.

13 THE COURT: All right. Mr. Marshall, is there
14 anything you wish to say? You filed a resistance. I read
15 that, of course. Counsel here in Sioux Falls, which is
16 Counsel Marshall, as well as Mr. Jackley and Mr. Swedlund,
17 when you speak, if you would speak at the podium, it works
18 better, I've been told, for Mr. Van Norman to be able to
19 see you through the video that we're having. So if you
20 would speak from the podium, please.

21 MR. MARSHALL: Thank you, Your Honor. May it
22 please the Court, counsel. I just want to touch on several
23 of the points that I made in my Brief Resistance.

24 To summarize that, we're here, Your Honor, at the
25 insistence of a lawyer that has a conflict of interest

1 trying to appeal a decision from which no appeal lies on
2 behalf of a stranger to this action.

3 I appreciate and acknowledge the Court's right and
4 duty to make the inquiry that it made, but having made that
5 inquiry, the Court merely accepted the Stipulation and gave
6 it its intended effect. That effect was a dismissal of
7 this action from which no appeal lies.

8 The next point I would like to make is that
9 Mr. Van Norman did, in fact, represent Donald Moeller in
10 this action, and here he appears on behalf of a different
11 client taking a position that is diametrically opposed to
12 his client's wishes, that is, Mr. Moeller's wishes. I have
13 called this conflict of interest to Mr. Van Norman's
14 attention.

15 I believe it is a conflict under Rule 1.9(a), a
16 situation where he could appear if Mr. Moeller consented in
17 writing. Mr. Moeller does not do so. I respect
18 Mr. Van Norman's decision to the contrary. Nonetheless,
19 Your Honor, I believe that he is precluded by the ethical
20 rules from representing Ms. Nichols.

21 In Mr. Van Norman's presentation, he repeatedly
22 referred to Agnes Becker as Don's stepmother and
23 Ms. Nichols as a stepsister. I would like to correct the
24 record. Agnes Becker is not Donald Moeller's stepmother.
25 She is, instead, married to his stepfather, and has no

1 direct relation to Don whatsoever.

2 THE COURT: I wondered about that. I couldn't
3 trace that connection, from what I knew.

4 MR. MARSHALL: That is the sum and substance of
5 that, Your Honor.

6 THE COURT: So then Donna Nichols is what
7 relation, if any?

8 MR. MARSHALL: I believe the proper
9 characterization is a stranger to the family. They may
10 have a close relationship, but there is no relationship
11 either legally or by blood.

12 THE COURT: All right.

13 MR. MARSHALL: Your Honor, again, this appears to
14 be an effort by the Arkansas Public Defender or their
15 employees to assert their wishes for Mr. Moeller, not a
16 representation on behalf of Mr. Moeller, and my authority
17 for that is that signature block, which showed up on the
18 initial Notice of Appearance where Mr. Van Norman appeared
19 on behalf of Dr. Semmerling.

20 The last point I would like to make --

21 THE COURT: Dr. Semmerling was the fellow that
22 came out here many times through the Arkansas Public
23 Defender's Office. He's the fellow from Chicago and spoke
24 many times with Mr. Moeller. Is that correct?

25 MR. MARSHALL: That is correct, Your Honor. And

1 the last time apparently under false pretenses, where he
2 represented to Don that he was visiting as a friend, and
3 that visit showed up in the Public Defender's papers as
4 contact by an employee of their office.

5 Finally, Mr. Van Norman suggests that this is a recent
6 change of heart. I can represent --

7 THE COURT: By whom?

8 MR. MARSHALL: By Mr. Moeller.

9 THE COURT: I don't see any representation that
10 Mr. Moeller has changed his mind.

11 MR. MARSHALL: No, but the representation I
12 heard, Your Honor, was that Mr. Van Norman said
13 Mr. Moeller's current decision to allow the execution to go
14 forward is a recent change of heart. I would like to speak
15 to that in a matter that only I am able to.

16 As the Court knows and as the pleadings reflect, I am
17 the lawyer who initiated this civil rights claim on behalf
18 of Mr. Moeller.

19 THE COURT: The one here in Federal Court?

20 MR. MARSHALL: That is correct, Your Honor. I
21 did that --

22 THE COURT: I appointed you.

23 MR. MARSHALL: And I appreciate that. The point
24 is, I brought this claim only with the representation to
25 Mr. Moeller that if he chose to change his mind and drop

1 this action, I would honor that decision.

2 I had to convince Don to bring this action years ago.
3 He has been reluctant to proceed with his federal habeas
4 and with a civil rights action as long as I've represented
5 him. His consent was only obtained by my representation to
6 him that if he changed his mind, I would honor his wishes.

7 This is not something that has happened in the last
8 few weeks or months. This is a decision that Don has given
9 thought to for years, and he's only here because I told him
10 that if he changed his mind, I would respect his wishes and
11 do what I could within the rule of law to follow that out.

12 So this is no last-minute effort to capitulate because
13 of intolerable conditions or because of a childhood that
14 was fraught with problems. Don has thought about this for
15 years, Your Honor. The thing that that time has allowed in
16 my opinion is the opportunity for Don to accept the
17 consequences of his actions.

18 Your Honor, I believe that is really one of the
19 primary goals of the entire criminal justice system is for
20 a Defendant to come to terms with his conduct and the
21 consequences that flow from that conduct.

22 So while I don't agree with Mr. Moeller's decision, I
23 recognize that it's his and his alone to make, given what
24 he has demonstrated to the Court already.

25 I would respectfully ask the Court to deny the stay.

1 I'm not sure if we're here on a Motion for the Appointment
2 of a Next Friend, but if that's the case, deny that, and
3 allow matters to proceed as set by state law.

4 THE COURT: Well, so that it's clear, are you
5 saying that Donald Moeller is doing this despite
6 intolerable conditions? Are you saying there are
7 intolerable conditions? I mean that could be taken either
8 way.

9 MR. MARSHALL: I do not believe the conditions
10 are intolerable. I believe others have suggested they are.
11 I disagree with that.

12 THE COURT: Very well. Anything further?

13 MR. MARSHALL: No, Your Honor.

14 THE COURT: All right. Thank you. Let me hear
15 from the State for the Defendants.

16 MR. JACKLEY: May it please the Court, counsel.
17 Your Honor, much of the State's position parallels what
18 Mr. Marshall just indicated to the Court. Essentially the
19 State takes three positions in this matter.

20 Number one, that the Court lacks jurisdiction pursuant
21 to Rule 41. That we've had the hearing of October 4, that
22 the Court has accepted that Rule 41 Stipulation, and that
23 this case has been dismissed with prejudice.

24 The State's second position is that the claimed next
25 of friend lacks standing, and lacks standing for two

1 reasons. Number one, that there's been no sufficient
2 reason or justification for the need to have a next of
3 friend in this case. Although competency is cited, there's
4 been no evidence to demonstrate an incompetency.

5 Number two, the interest linking the would be next of
6 friend of Defendant has not been sufficiently established.
7 As has been pointed out, we have an unnotarized document
8 that was signed January 16 that doesn't sufficiently
9 establish what would be necessary that we've seen in the
10 case law with the next of friends.

11 The third point being that there's been no
12 demonstration that there's a significant likelihood of
13 success to justify a stay of the upcoming execution for the
14 week of October 28.

15 Briefly, with respect to competency, the Rees case
16 gives us a standard that, "A Defendant must have the
17 capacity to appreciate his position and make a rational
18 choice with respect to continuing or abandoning future
19 litigation."

20 On October 4 this Court entered a fairly lengthy
21 colloquy with Mr. Moeller where I believe this record and
22 the Court was correct in essentially ruling that he is
23 competent. That it appeared, at least from my position on
24 October 4, that Mr. Moeller accepted responsibility, and
25 that he had an understanding of the lethal injection

1 process.

2 I think, further, if one were to dive into the record
3 of what the Arkansas Federal Public Defender has presented
4 regarding the competency issue, there's been no even
5 entry-level or threshold showing of incompetency. To the
6 contrary, Dr. David Lisak from August 2011 gave information
7 that would indicate Mr. Moeller is, in fact, competent.
8 That submission is in the record.

9 Similarly, when it comes to Tim Semmerling and
10 Craig Haney, there's some information in the record on a
11 deprived childhood, but not rising to the level of
12 satisfying the Rees standard.

13 Finally, in additional submissions to the Court, and I
14 want to be careful because they are under seal. Document
15 396 deals with a correctional behavioral therapist that
16 would indicate further evidence of Mr. Moeller's competency
17 under the Reed standard.

18 THE COURT: Well, I haven't sealed those. You
19 know, it appeared that certain things I ordered got sealed.
20 Obviously I ordered it sealed. But the parties sealed some
21 things by them coming in. I hadn't noticed, since, of
22 course, they don't come to me personally. I hadn't noticed
23 that some things were under seal.

24 There are things that are sealed that I'm going to go
25 back through and look at the documents. I might unseal

1 some things.

2 What I ordered sealed specifically, of course,
3 pursuant to the Defendant's Motion was protecting the
4 identity of the execution team, that was one thing, and
5 protecting the identity of the compounding pharmacist.
6 That was another. The final thing was protecting the
7 identity of the entity that provided the active ingredient
8 for the pentobarbital. Those things, of course, get
9 scattered through other pleadings.

10 For instance, since you are here, we'll talk about it,
11 because nobody made a Motion to me specifically to seal the
12 things you filed today. Why should they be sealed?

13 MR. JACKLEY: I think that Motion is coming,
14 Your Honor. There are three separate documents.

15 THE COURT: I've read them.

16 MR. JACKLEY: I would suggest with respect to
17 Document 396, because that document contains behavioral
18 psychological type information regarding the Defendant, I
19 think there's a justification and a basis to seal that
20 document.

21 THE COURT: I think given the nature -- I didn't
22 mean to cut you off. Anything else on that?

23 MR. JACKLEY: No, Your Honor.

24 THE COURT: Given the nature of this claim in
25 this thing, there might be an overriding public interest in

1 that information being public. I'll hear from
2 Mr. Moeller's lawyer with regard to that. There have been
3 all kinds of claims made by people that have never seen him
4 with regard to his mental incompetency. Here in what's
5 been filed, information from people that have actually
6 talked to him. Why shouldn't that be public record?

7 MR. JACKLEY: I'll take the same position as I
8 did in the Berget case in front of the South Dakota Supreme
9 Court. I don't, as Attorney General, have a problem with
10 that, but out of an abundance of caution of behalf of a
11 Defendant who has had psychiatric care, there are statutes
12 that do tend to indicate that is a privacy matter. I
13 understand that can be waived by raising certain claims.

14 But in this instance Mr. Moeller has not taken the
15 position that he's incompetent, so I don't believe he's
16 waived that. He certainly can. But I believe that
17 probably is his right to waive and not for me.

18 I don't have an objection with respect to its release,
19 but out of respect to Mr. Moeller and that
20 psychological-type process, it's not a doctor, so it's not
21 privileged information contained in that document, but it
22 is behavioral information, and I think that would be more
23 for him to answer whether it should be sealed or not,
24 Your Honor.

25 THE COURT: Well, I would make a distinction. I

1 mean he's had psychiatric and psychological observation. I
2 don't know that he's ever had psychiatric or psychological
3 care.

4 MR. JACKLEY: That's fair. With respect to the
5 other two documents, Your Honor, and, again, I want to be
6 careful. But it's Document 394, which would be Deponent
7 No. 1, as well as Warden Weber's Affidavit, Document
8 No. 395, because of the sensitive nature of the information
9 pertaining to the drug protocols and the pharmacy
10 involved --

11 THE COURT: It does not identify the pharmacy.

12 MR. JACKLEY: My concern is could you take that
13 data and be able to conclude additional information? I
14 don't know the answer to that. But that was the reason, in
15 order to make sure we were cautiously within the Court's
16 Order, as well as the State statute, that would make it a
17 criminal misdemeanor for me to disclose information
18 regarding executions. I just am asking that it be sealed
19 for that purpose.

20 THE COURT: You'll have to make a clearer showing
21 to me. I don't have anything in writing. They are just
22 filed. I'm not going to seal them without good cause
23 shown.

24 MR. JACKLEY: Your Honor, it's coming today. I
25 apologize. This Motion came Friday. We've been scampering

1 to get you Affidavits. We will make sure that's followed
2 up with the appropriate Motion yet today.

3 THE COURT: Thank you. Anything further? I have
4 other questions for you, but I want you to get your share
5 of statements made first.

6 MR. JACKLEY: Just briefly on the case law,
7 Your Honor. There's been a reliance on the Florida case,
8 the Eleventh Circuit case. I just wanted to provide the
9 Court with additional authority that I think is controlling
10 in this instance.

11 I would start with the Nooner v. Norris case,
12 491 F.3d 804. That's a 2007 Eighth Circuit case. I think
13 the importance of that case talks about distinguishing the
14 habeas action from the Section 1983 action, and the
15 importance in a habeas action, of course, neither the
16 conviction, nor the sentence is final.

17 In this instance here in Mr. Moeller's case, we are
18 obviously finished with the habeas. The conviction and
19 sentence is final. We're at the 1983 action simply dealing
20 with the manner of execution.

21 THE COURT: Well, I think in the past at the
22 October 4 hearing I made the observation that the habeas
23 case law is instructive, but not controlling with regard to
24 the 1983 action. It's still instructive, though. Do you
25 agree?

1 MR. JACKLEY: I agree it's instructive, but it
2 wouldn't be controlling, Your Honor.

3 I would also point out, and this is contained in our
4 briefing, Smith v. Armontrout, 812 F.2d 1050, citing 1059.
5 It's a 1987 Eighth Circuit case, for the proposition that
6 even assuming the State's method of execution is contrary
7 to the Eighth Amendment, which we're not saying here, but
8 if you were to assume that, "It does not serve to confer
9 standing upon a next friend in the absence of some other
10 basis for standing."

11 Here the only claimed basis is a competency issue.
12 The Court has gone through this on October 4, and I
13 presented the argument. But there is no evidence of record
14 that Mr. Moeller is incompetent under the Rees standard.

15 Finally, Your Honor, I would argue there is no
16 significant likelihood of success on the merits, and I
17 would cite the recent carrying out of the Roberts'
18 sentence. I would cite Documents 394 and 395, and I would
19 further cite the testing results that have been submitted
20 to the Court.

21 With that, Your Honor, I have no further argument. If
22 the Court has any questions, I would be happy to answer
23 those.

24 THE COURT: I do. It always catches the Court's
25 attention when everybody is saying no jurisdiction. A

1 couple things on that. Of course that was argued at the
2 October 4 proceedings, not by the State, and, of course, I
3 proceeded there on the basis -- because Mr. Marshall was
4 arguing no jurisdiction, you know, that Rule 41 under the
5 Federal Rules of Civil Procedure are self-executing. I
6 said, "Well, but under the circumstances the inherent power
7 of the Court allows the Court to proceed, anyway," which
8 you agreed with at that point.

9 Now we're back to somebody claiming to be a next
10 friend. In the papers that Mr. Van Norman filed, he
11 referred to Appellate Rule, now we're into Appellate Rules,
12 not the Civil Rules, but Appellate Rule 8(a)(1) where it
13 says, in asking for a stay, then it says, "Initial Motion
14 in the District Court. A party must ordinarily move first
15 in the District Court for the following relief: A stay of
16 the judgment or order of a District Court pending appeal;
17 approval of a supersedeas bond; or an order suspending,
18 modifying, restoring, or granting an injunction while an
19 appeal is pending."

20 Well, "stay of the judgment or order of a District
21 Court pending appeal," there wasn't actually a judgment
22 dismissing, because I ultimately ruled it was a
23 self-executing Stipulation, which under Rule 41 it could
24 be.

25 But then Mr. Van Norman, out of probably an abundance

1 of caution, which isn't a bad thing in these matters, then
2 applied here for a stay. If there was an inherent
3 authority in the Court to review the rule, the claimed
4 Rule 41 dismissal, then might there not be inherent power
5 in the Court, particularly in view of Rule 8(a)(1) in the
6 proceedings of this matter, for the Court to hear this
7 matter instead of just dismissing it out of hand?

8 MR. JACKLEY: Your Honor, it's the State's
9 position, because of the nature of Rule 41 and what
10 occurred at the October 4 hearing wherein the competency
11 determination was made, that that decision by the Court has
12 been made. The Court has exercised its inherent authority.

13 This matter at this point in time, there is no
14 jurisdiction, either in the Appellate Court or with this
15 Court, based upon Rule 41, the self-execution and the
16 evidence, the complete lack of any evidence that
17 Mr. Moeller is incompetent under the Rees standard.

18 THE COURT: Whether he's incompetent or not
19 doesn't have anything to do with whether the Court has
20 jurisdiction inherently.

21 MR. JACKLEY: It would appear from some of the
22 case law, and even if one were to go to the Ford case, that
23 when you are dealing with the competency issue, that
24 appears to be a basis upon which a Court can go in under
25 the law under its inherent jurisdiction to examine that.

1 But then once that's been examined, like my position
2 is it has been in this case, it was on October 4, that the
3 Court now has dismissed the case, and it's been dismissed
4 with prejudice. Therefore, there's no jurisdiction.

5 THE COURT: Let's take it the other side.
6 Instead of, frankly, the weak showing that's been made by
7 Mr. Moeller -- excuse me, by Ms. Nichols, I don't mean to
8 be showing my hand on that, so to speak, but, nonetheless,
9 it's a weak showing. Let's say instead of that, that
10 Mr. Van Norman came in, and there was some psychiatrist
11 that had examined Mr. Moeller and found that not only was
12 he not competent, but he was way beyond any kind of
13 rationality about what was going on, so on and so on. Very
14 strong showing.

15 The Court wouldn't have any authority then to act, do
16 you think?

17 MR. JACKLEY: First of all, that isn't the case
18 here.

19 THE COURT: That isn't what I'm asking you.

20 MR. JACKLEY: I understand. I would still say
21 no, because of Rule 41 --

22 THE COURT: Why? You just let it proceed ahead
23 and you then execute somebody who is stark-raving mad?

24 MR. JACKLEY: When you look at the Smith
25 decision, the case I cited to the Court, there is talk of

1 it's in the nature almost of a waiver. That depending on
2 when these claims are brought, including with a 1983
3 action, that there comes a point in time, and in this
4 instance it's 22 years, Your Honor, that --

5 THE COURT: Don't go back to the facts here. I
6 put a hypothetical to you because it tests your
7 jurisdiction argument.

8 MR. JACKLEY: I would say the Court lacks
9 jurisdiction, and I would cite the Smith case, Your Honor.

10 THE COURT: All right. That's a short answer.
11 It's not very convincing. Anything else?

12 MR. JACKLEY: No, Your Honor.

13 THE COURT: Thank you. Mr. Van Norman, you are
14 the moving party. Go ahead.

15 MR. VAN NORMAN: I would like to start
16 chronologically or sequentially here.

17 With regard to the issue of conflict of interest, I
18 would advise the Court that there was a serious search made
19 to find attorneys who had no connection with Mr. Moeller
20 previously. That was unsuccessful. That was undertaken by
21 my legal assistant, by me while I was out of town, and, as
22 well, by the Arkansas Federal Defender's Office. I talked
23 with them on a number of occasions, and had, in fact, told
24 them I didn't want to become an object of any controversy
25 here because of my prior representation of Mr. Moeller.

1 I did e-mail Mr. Marshall yesterday, after I got back
2 to town, after I thought about his having raised this
3 issue, and concluded that, in fact, under the circumstances
4 that Mr. Moeller's competency is still in question,
5 according to Ms. Nichols, based on her background with
6 Mr. Moeller, that I don't have a conflict in that instance.

7 Assuming, Your Honor, with all due respect to the
8 Court's prior decision, if logically the Court were wrong
9 in that regard, obviously I don't have a conflict. But
10 that really is a side issue, I think.

11 With regard to the --

12 THE COURT: Just a moment. I want you to be able
13 to say your piece to defend yourself with regard to the
14 conflict issue. But if you get tossed out of Court on this
15 thing, it isn't going to be because of a conflict issue.
16 So you don't have to worry about that one.

17 MR. VAN NORMAN: I understand, Your Honor. I
18 just wanted to make a record very briefly on that topic,
19 because I didn't want to become the issue here.

20 THE COURT: I understand, and that's why I let
21 you make the record, because I understood you wanted to.
22 But I'm going to decide this thing on its merits, not the
23 question on whether or not you can appear here or not.

24 One other thing you haven't said, but I thought,
25 because this case has been around me for a long time, I

1 thought you were mainly a mitigation lawyer in the second
2 State prosecution of Mr. Moeller after it was first
3 overturned because of an evidentiary error. I thought your
4 work was mainly in mitigation, which then wasn't presented.
5 Am I wrong on that?

6 MR. VAN NORMAN: Yes, you are incorrect,
7 Your Honor. That was what the original appointment by
8 Judge Rusch was for. By the time the defense team moved to
9 Rapid City, I was deeply involved in the case.

10 I can describe that very quickly for the Court. That
11 was, we did panel selection. There were 16 panels that we
12 reviewed an hour to an hour and a half as a panel. I did
13 all 16 panels for jury selection. Then the other two
14 attorneys and I rotated one juror at a time on individual
15 sequestered voir dire.

16 After that, Your Honor, I don't want to omit this at
17 all, because I also saw Mr. Moeller's reference during the
18 October 4 hearing to my role, so I want it to be very
19 clear.

20 I also then handled both the State's forensic
21 pathologist for purposes of cross-examination, presented
22 the defense pathologist, forensic pathologist to the jury
23 during the guilt and innocence phase.

24 Following that, because of a conflict that I had
25 become aware of between Mr. Gienapp and Mr. Moeller, now

1 Judge Gienapp, I was nominated to prepare Mr. Moeller to
2 testify. I did present him as a witness in his own
3 defense, and I spent many hours with Mr. Moeller at the
4 Pennington County Jail alone discussing his testimony.

5 So my participation was deeper than what Mr. Moeller
6 indicated and perhaps had been disclosed in prior
7 proceedings by this Court.

8 The issue with regard to mitigation, that's how I was
9 initially appointed, and we did work on mitigation issues.
10 Those were precluded from being presented by client
11 decision, Your Honor.

12 THE COURT: All right. Go on to your merits
13 argument then.

14 MR. VAN NORMAN: Thank you. I believe under the
15 circumstances of the Declarations by various individuals in
16 this case, that there's an indication of a substantial
17 possibility of prevailing on appeal, Your Honor.

18 THE COURT: Just a moment. I'm going to
19 interrupt you, because one of the things that strikes me,
20 because naturally I've read and reread those Affidavits.
21 But, of course, none of them have ever even spoken to
22 Mr. Moeller. None of them in their Affidavits have even
23 indicated they've ever read any documents with regard to
24 his incarceration, anything with regard to any
25 incarceration reviews that have gone on.

1 They didn't indicate in their documents even that they
2 read any report from or spoke with the psychologist that
3 came out and apparently interviewed Mr. Moeller on behalf
4 of the defense team. None of that is in there. It's all
5 talking about prison conditions and how it conditions him
6 to waive.

7 MR. VAN NORMAN: Yes. I think that's part of the
8 competency issue, from my perspective on behalf of
9 Ms. Nichols under these circumstances. I understand
10 exactly what the Court is saying.

11 I would also like to address another issue that goes
12 to the merits here. That has to do with the actual prison
13 conditions. I don't believe that the actual prison
14 conditions have been thoroughly examined. I can call that
15 a failure by the Federal Defenders, or I can call it
16 whatever as a defect in the record.

17 I am more than passingly familiar with the prison
18 conditions, Your Honor. Last summer, a year ago now, I
19 spent five weeks in a resentencing trial as part of the
20 defense team on behalf of Briley Piper, who remains in
21 administrative segregation and on death row.

22 I questioned at length a number of the correctional
23 officers, including the one affiant here, and is it okay if
24 I make reference to it? The affiant in Document 396, Your
25 Honor, that we just received this morning. I'm very

1 familiar with that individual, who is not a therapist.
2 They call him a correctional behavioral therapist in the
3 sense that, as I recall, he has a Bachelor's degree, and
4 that is the extent of his knowledge.

5 But I do refer to Dr. Haney's review of the
6 circumstances, and can only say, yes, it is secondhand in
7 some respects.

8 THE COURT: That's in every respect.

9 MR. VAN NORMAN: He hasn't talked to Don Moeller.
10 I understand that.

11 THE COURT: Nor has he ever been to the South
12 Dakota State Penitentiary.

13 MR. VAN NORMAN: I'm not sure of that,
14 Your Honor.

15 THE COURT: Well, it doesn't say that he has.

16 MR. VAN NORMAN: He didn't say he had been. I
17 know Craig Haney from prior work I've had with him. I can
18 assure the Court that he is very reputable and very
19 informed with regard to the conditions he describes and the
20 effect it normally has on --

21 THE COURT: He doesn't describe the conditions at
22 that prison. He describes prison conditions generally in
23 his literature. Right?

24 MR. VAN NORMAN: I agree with you. That's
25 correct. Absolutely.

1 I wanted to clear up one matter, as I understand it,
2 with regard to Dr. Lisak, if I'm pronouncing his name
3 correctly. I believe it's L-I-S-A-K. He did not do a
4 psychiatric evaluation of Mr. Moeller. I understand that
5 Dr. Lisak is a trauma expert, and he evaluated Mr. Moeller
6 with regard to the effects of history -- historic effects
7 of trauma on him primarily, and that was face to face.

8 THE COURT: Well, have you read his report?

9 MR. VAN NORMAN: Yes, sir.

10 THE COURT: Of course that was never provided to
11 the Court, and I assume, and this is perfectly fair, I
12 assume it wasn't provided, because it wouldn't be helpful
13 to Mr. Moeller.

14 MR. VAN NORMAN: I'm sorry, let me back up. I
15 have read his Declaration. I have not had access to his
16 actual report. I want that to be clear. Yes.

17 And I presume in civil litigation, you are absolutely
18 correct. That might be an inference that might be drawn.
19 I understand.

20 When I mentioned earlier, and Mr. Marshall mentioned
21 this, too --

22 THE COURT: Just a moment. Technically this is
23 civil litigation.

24 MR. VAN NORMAN: Yes. That's why I mentioned it
25 in that context.

1 Mr. Marshall indicated that this had not been a sudden
2 change of opinion or decision-making by Mr. Moeller. I was
3 referring to the fact that Ms. Nichols and Ms. Becker, both
4 of whom have known Don Moeller for decades and have had
5 relatively frequent contact with him --

6 THE COURT: Now just a minute. Ms. Becker isn't
7 on the horizon at this point. This is Ms. Nichols you are
8 asking to be a next friend. I am still troubled by the
9 fact that this is an Affidavit taken last January, January
10 2012, that is just generally showing her support for
11 Mr. Moeller, but, number one, it's not under oath. Number
12 two, it doesn't show that she -- what kind of contact she's
13 had with him, the frequency of the contact, the recency of
14 the contact, and it doesn't have one scintilla of a hint
15 that he doesn't know generally what's going on, or, more
16 specifically, what's going on in these proceedings.

17 MR. VAN NORMAN: I understand that, Your Honor.
18 As an officer of the Court, I've made representations
19 earlier during this hearing, based on my interviews of
20 Ms. Nichols, which I believe properly supplement that
21 Declaration by her.

22 THE COURT: I don't think so.

23 MR. VAN NORMAN: I accept the Court's
24 observation, of course. Ms. Nichols has also relied on who
25 Mr. Moeller has described as a stepmother, Agnes Becker.

1 THE COURT: This statement doesn't say that, that
2 she's representing something that Ms. Becker says with
3 regard to his not being competent or knowing what's going
4 on. There's nothing in that statement about that.

5 MR. VAN NORMAN: I agree, Your Honor. As an
6 officer of the Court, I am supplementing that by my
7 interview of her, and saying, in fact, she has told me
8 those very same things, that she's relying on her mother's,
9 that is, Agnes Becker, Ms. Nichols' mother's observations.

10 With regard to the merits of the claim, Your Honor, I
11 believe that an Eighth Amendment claim has been presented.
12 I don't think it's been fully adjudicated, and I think
13 there are serious issues with regard to both the substance
14 proposed to be used, the compounding issues, as well as the
15 protocol as represented or laid out in the depositions and
16 the other Declarations that have been presented to the
17 Court under seal.

18 THE COURT: Let's talk about that for a minute.
19 The State filed documents this morning that showed -- one
20 of the big points that was made by the Arkansas Public
21 Defender's Office was the fact that this pentobarbital is
22 not available in a manufactured complete form for execution
23 purposes, because the manufacturer took it off the market
24 for that purpose. I mean it's available otherwise, but not
25 for execution. So they made a lot of points with regard to

1 that.

2 Now what was filed this morning shows that there was,
3 with regard to the pentobarbital that's proposed to be used
4 on Mr. Moeller, that that's been subject to separate
5 laboratory examination, and found to meet standards that
6 are set forth in the Affidavit. I'm not relitigating that,
7 but I mean you brought it up.

8 So that addresses that issue, and particularly in view
9 of -- it was alluded to at the October 4 hearing. It
10 hasn't gotten any better with regard to those compounding
11 pharmacies that really wind up manufacturing large, large
12 quantities of drugs, but not under manufacturing regimens.
13 This is an individual mix, rather than a manufacturing mix.

14 Nonetheless, that is addressed in what the State filed
15 today. You recognize that.

16 MR. VAN NORMAN: Yes. I acknowledge obviously
17 that just before the hearing I received an Affidavit of
18 Deponent No. 1, and I believe it's Document 394. I have no
19 way to respond more specifically to that, and I understand
20 what the contents are.

21 THE COURT: Okay. Go back to the merits.

22 MR. VAN NORMAN: Yes, Your Honor. I think there
23 is some question obviously, based on the Affidavit, as to
24 the merits of a portion of this claim. I don't believe
25 that that takes care of the protocols followed that

1 apparently are at issue. I believe there's still an issue
2 based on I believe it's Dr. Seller's Declaration to the
3 Court with regard to the whole chemical procedure and
4 potential problems here that remains. That's separate from
5 whether or not there was a proper competency determination
6 made.

7 I would like to say this about the knowing and
8 voluntary issue. I have interviewed the Federal Defenders.
9 They also said on the record at the October 4 hearing that
10 they had, they thought, misunderstood the Court's Order
11 with regard to protected or sealed information. They have
12 confirmed that again as recently as last night when I
13 talked with them again about that very topic, because I
14 wanted to be very clear.

15 They had not advised Mr. Moeller with regard to the
16 specific issues that they developed, both through
17 depositions as well as through the Declarations of the
18 chemists or the scientists who have looked at this
19 situation.

20 THE COURT: Of course, it wouldn't be easy since
21 he refused to see them after January of 2012.

22 MR. VAN NORMAN: Well, I think there are other
23 ways to inform people. They said they had understood the
24 Court would not permit them to advise him specifically as
25 to what they believed they had found.

1 THE COURT: If they had any question about that,
2 and they were vigorous in their presentation of their
3 positions. If they had any question about that, they could
4 have filed yet another pleading. We have 390 or something
5 like that in this file.

6 MR. VAN NORMAN: And I'm not defending what their
7 omissions are or their failures, if they were, Your Honor.
8 I'm saying that didn't happen. Based on that, I don't
9 believe it was a knowing and voluntary decision by
10 Mr. Moeller.

11 Now, how far that could have gone as far as explaining
12 to him in Court or in other examination or another
13 presentation is a different issue that didn't happen on
14 October 4. I don't believe it's happened subsequently in
15 any way.

16 This is, as the Court knows, and I'm a late-comer
17 obviously to the file, a huge file with a lot of very
18 complicated issues in it which are difficult to understand
19 and address.

20 What I'm asking for obviously, that Donna Nichols be
21 appointed as guardian ad litem here, and separately that
22 the Court issue a stay.

23 I would like to move to the jurisdictional issue, if I
24 might.

25 THE COURT: Sure.

1 MR. VAN NORMAN: I don't think there's any
2 question that the Court has under Rule 8 of the Rules of
3 Appellate Procedure, which I anticipated is what we would
4 look at in that regard, that the Court has -- I have to
5 apply to this Court, unless there's something unusual. I
6 believe this is run-of-the-mill in some respects as far as
7 procedurally applying to the Court for a stay.

8 Of course I am applying to the Court for a stay. In
9 this instance there is jurisdiction clearly in this Court
10 to consider both the request I've made on behalf of
11 Ms. Nichols, as well as with regard to a stay. So I don't
12 think it's correct at all that there's no jurisdiction. I
13 agree entirely with the Court's hypothetical to Mr. Jackley
14 that the Courts have to be open obviously, and the Court
15 has to, as a matter of course, consider something as
16 serious as this.

17 So those are the things I'm asking for here,
18 Your Honor. It's fairly simple, and I think it's fairly
19 straightforward, but it's very grave circumstances, as the
20 Court is aware.

21 THE COURT: Thank you.

22 MR. MARSHALL: May I, Your Honor?

23 THE COURT: You may.

24 MR. MARSHALL: Thank you for your indulgence.

25 First of all, I'd like to represent to the Court on behalf

1 of Mr. Moeller that he sees no need to seal the documents
2 that were proffered today, and would consent to their
3 filing and being of record.

4 Your Honor, you asked a question about jurisdiction,
5 and I want to be very respectful when I say this. But this
6 is a case which calls for counsel and the Court to observe
7 their proper role. Death cases are charged with emotion, a
8 sense of what's right and wrong, and a sense of value.

9 I respectfully suggest, Your Honor, that that
10 Stipulation is effective, whether you found competence or
11 not.

12 I would respectfully suggest that there is no appeal
13 of any kind from that Stipulation.

14 Finally, and, again, respectfully, Your Honor, suggest
15 that while --

16 THE COURT: You don't have to worry about the
17 respectful part. Go ahead.

18 MR. MARSHALL: Well, you don't have jurisdiction,
19 Judge.

20 THE COURT: You argued that last time, too.

21 MR. MARSHALL: And I understand I lost that.
22 But, nevertheless, there was an effective Stipulation.

23 I appreciate that Rees may be instructive, but it's
24 not controlling.

25 This case, when you strip away the emotion and

1 gravity, is no different than any other civil rights case
2 that the parties can agree to dismiss. This case becomes
3 important, because everyone is injecting their own view of
4 what is right and wrong, and sometimes we must confine
5 ourselves to the role defined by law for us.

6 In this case, Your Honor, I believe that that is to
7 deny the Motions for want of jurisdiction.

8 How do you appeal an Order from which both sides have
9 agreed that the case is gone, other than to inject your own
10 view of what is right and what is wrong?

11 Again, it's Don Moeller's arm, Your Honor. It's his
12 case. The issues, touching the public interest, if they
13 were present, why didn't they happen in the last execution?
14 They are only present in this case because he brought a
15 civil rights case. He was competent then.

16 Mr. Van Norman talked at length about how deeply he
17 was involved. Suggests he shouldn't be here taking a
18 position directly opposed to what he was doing then,
19 contrary to his client's interests.

20 It's difficult for me to stand here and say these
21 words, but I took an oath as a lawyer to be a zealous
22 advocate within the boundary of law, and not to step over
23 that boundary and advocate on behalf of what I think is
24 right, even though the law says otherwise. This isn't a
25 circumstance where we're arguing for an extension of law,

1 for anything that is even colorably debatable.

2 Don Moeller stood or sat in that witness box and told
3 you, as cogently and intelligently as any person I have
4 ever heard, that he wants to dismiss this appeal.

5 Your Honor, please allow him that last element of
6 dignity and end these proceedings.

7 THE COURT: Don't sit down yet, because we're
8 going to talk about jurisdiction a little bit. This has
9 been before this Court since 2004. At some point along the
10 line I made a decision to separate the habeas action from
11 the 1983 action, so that the habeas, in other words, the
12 guilt or innocence, which was contested at that time, could
13 go up to the Eighth Circuit and to the Supreme Court, which
14 it did. The Eighth Circuit affirmed this Court's decision
15 with regard to the guilt or innocence phase and the habeas.
16 The Eighth Circuit affirmed that. Then, of course as you
17 know, the United States Supreme Court denied certiorari,
18 which was the end of that.

19 Just thinking out loud about this, if the Court had
20 instead not severed the two separate causes of action and
21 instead left them together, where would we be different
22 now? Because we would have the habeas that would have had
23 to have gone up with this issue, and would we have then
24 waited -- we would have had to wait, I guess -- I'm
25 thinking out loud on this since you brought it up. We

1 would have, in order to adjudicate the 1983, in other
2 words, the protocol for execution in the mode and manner,
3 which has been a moving target with the State, because the
4 State hasn't done this, you know, it sits then until 2007.

5 So would we just now be at some point going up to the
6 Eighth Circuit? Because then there would be no question
7 about jurisdiction, because you would have the habeas and
8 the 1983 intertwined.

9 MR. MARSHALL: Your Honor, I think there is one
10 element absent in your hypothetical, and that is had these
11 cases' claims stayed together, would you have issued a
12 Rule 54(b) Certificate to allow the habeas to go up, or
13 would you have exercised your judicial discretion and kept
14 the case together? Don't know the answer to that question.

15 Had they been kept together, I don't believe we would
16 be here, because all of these issues would have been
17 decided, and there would be no question of jurisdiction.

18 THE COURT: So then what kind of test would there
19 have been of the protocol then, because the protocol we're
20 talking about here was only entered in October of 2011.

21 MR. MARSHALL: Well, I think we would have been
22 addressing a different protocol, Your Honor.

23 THE COURT: To the dismay of your client,
24 frankly, because the old protocol is clearly a less
25 desirable one than the current one. You weren't involved

1 in that part of it, though.

2 MR. MARSHALL: Indeed I was, because part of my
3 argument concerned the initial protocol.

4 THE COURT: Not the latest, though.

5 MR. MARSHALL: I have read those documents,
6 Your Honor, but you're correct. Not what we call the
7 intermittent protocol.

8 THE COURT: There is that one, too. All right.
9 Anything else?

10 MR. MARSHALL: Thank you for your indulgence.

11 THE COURT: Certainly. Well, Mr. Marshall got
12 the second bite at the apple. Anything further from the
13 State?

14 MR. JACKLEY: Can I have a moment, Your Honor?

15 THE COURT: Sure.

16 MR. JACKLEY: The State has nothing further,
17 unless the Court has any questions, Your Honor.

18 THE COURT: No. I want to test your jurisdiction
19 argument again, Mr. Marshall, if you'd come up to the
20 podium.

21 I'm going to put essentially the same question to you
22 that I put to Mr. Jackley. That is, let's say that instead
23 of, frankly, the record that we have, which is one where
24 Mr. Moeller spoke clearly, cogently, without hesitation, on
25 October 4 when I was questioning him for about half an

1 hour.

2 At the end I said, "Do you have anything further you
3 want to say?" He said, "Well, there were a couple more
4 things I thought you might ask me." I said, "What's that?"
5 And he told me. I thought they were good questions, so I
6 asked him those, too.

7 Well, let's say instead of that situation and the rest
8 of the facts we have in this case, we had a situation where
9 we had a Rule 41(b) and there had been intervening time,
10 and then a solid evaluation from a psychologist or
11 psychiatrist came in and said, "This person is stark-raving
12 mad. Doesn't understand anything about what's going on."
13 But, nonetheless, there was a Rule 41 of record. Let's say
14 there were intervening events that stretched out the time,
15 and somebody was just absolutely mad. No understanding
16 what was going on to him and so on. Would there be
17 jurisdiction then?

18 MR. MARSHALL: No.

19 THE COURT: So we just go ahead and execute
20 somebody that is stark-raving mad?

21 MR. MARSHALL: Well, unfortunately Justice Scalia
22 has observed that sometimes an innocent person is executed.

23 THE COURT: Well, that wouldn't be an innocent
24 person. That would be a person that the Supreme Court says
25 shouldn't be executed because they're not competent at that

1 time, even though they might have been guilty as all
2 get-out when the crime was committed. So that doesn't
3 quite fit Scalia's statement.

4 MR. MARSHALL: But our rules, Your Honor, are
5 more important than the individual case. We are governed
6 by the rule of law which we have all sworn to uphold.
7 There are occasions, and I hope that they are extremely
8 rare, where those rules suggest such an outcome. I don't
9 believe, under the letter of the law, that there would be
10 jurisdiction in that case.

11 THE COURT: All right. I know your position.
12 Thank you.

13 Mr. Van Norman, they each got another opportunity.
14 You are the moving party. Anything else?

15 MR. VAN NORMAN: Thank you. Very briefly,
16 Your Honor.

17 I understand Mr. Marshall's position. He, also, I
18 thought, maybe it was a misstatement earlier in his
19 argument before the Court called him back to the podium,
20 that he said, "Notwithstanding competence or incompetence,
21 that the Rule 41 would be enforceable," and I obviously
22 have derived from what he just said again that a
23 stark-raving mad person who signed, when competent, a
24 Rule 41 Stipulated Dismissal can be executed based on their
25 earlier Stipulation.

1 That is incorrect, I believe, under both
2 Constitutional and State law. The State statutes that I
3 recall, in fact, preclude a person who is stark-raving mad
4 from being executed.

5 The other statement I would like to make, Your Honor,
6 is this isn't the regular run-of-the-mill case. The
7 U.S. Supreme Court has declared in various contexts that
8 that was different.

9 I am not here because I'm an opponent of the death
10 penalty, generally speaking. I am here because I believe I
11 can represent Donna Nichols under the circumstances, and
12 underline the portion "under the circumstances."

13 I would also like to say that the public interest of
14 waiting cruel and unusual punishment being imposed on any
15 citizen I believe outweighs any interest of that specific
16 individual in simply asking to be executed, which I believe
17 amounts or can amount to state-assisted suicide. That is
18 troubling, of course, on a moral scale. But that isn't why
19 I'm here, Your Honor. Thank you.

20 THE COURT: Let me ask you another question,
21 Mr. Van Norman. I have this Declaration of Ms. Nichols,
22 who lives here in Sioux Falls, you informed me. The
23 Declaration doesn't say that she ever went up to see
24 Mr. Moeller. He's been here for 20-some years now in the
25 Penitentiary here in Sioux Falls. She may well have

1 visited him. But the Declaration doesn't reflect that at
2 all.

3 MR. VAN NORMAN: That's correct. The Declaration
4 doesn't. The last time she saw him, I understand, was last
5 spring before she had two hip surgeries this summer. She
6 has taken Agnes Becker to the Penitentiary, whenever they
7 were able to arrange it, based on both of their health
8 conditions.

9 I understand the last verbal communication she may
10 have had with him was within the last six weeks, some kind
11 of controversy over a money order or something.

12 THE COURT: And the Declaration dated January 12,
13 before her hip surgeries, doesn't say anything about
14 visiting him or anything about his wishes at all.

15 MR. VAN NORMAN: That's correct. It doesn't.

16 THE COURT: Mr. Marshall, is there anything your
17 client wishes to say?

18 MR. MARSHALL: Yes, Your Honor. Mr. Moeller
19 would like to testify, if the Court would allow.

20 THE COURT: Well, he can make a statement.

21 MR. MARSHALL: Would you like him to come to the
22 podium?

23 THE COURT: Probably, since I suspect he's in leg
24 shackles, it's probably easier for him to speak through the
25 microphone.

1 THE DEFENDANT: Thank you, Judge. First of all,
2 I haven't seen Donna in over three years, maybe four times
3 in the last five years. The only time she came up was to
4 bring her mother to visit me.

5 I've gotten two notes from her this year, 2012. One,
6 she was really mad because I asked her mother for a few
7 bucks, and the second one to apologize.

8 She never told me about this January thing you've got
9 in front of you. So I don't know what they're doing.

10 They are not my friends, because they know my
11 position. I have written to them and spelled out that I'm
12 going to be executed and what to do with my property. So
13 they know this is my wishes.

14 Mr. Van Norman, when he was my attorney in Rapid City,
15 we talked about mitigation, and I told him that if I was
16 found guilty, there would be no mitigation. I did not want
17 family involved. Now somebody got my family, the shirttail
18 family involved.

19 As for being related, my stepfather, Glen Becker, was
20 married to my mother for eight years. After they were
21 divorced, Glen Becker married Mrs. Stelzer, who became
22 Mrs. Becker, Agnes Becker. She had a bunch of kids on her
23 own. That's how they become my family. So there's no
24 blood, no real connection there at all.

25 I have stayed with them when I was out of the

1 Penitentiary, but that was on a short, you know, surfing on
2 the couch type thing. Spent the nights and stuff.

3 She's not family. She's not been a friend. Like I
4 said, two notes this year.

5 THE COURT: All right. Thank you.

6 THE DEFENDANT: Thank you.

7 THE COURT: Well, I'll take this under
8 advisement, and after the October 4 hearing, I issued an
9 Opinion promptly. I'll take this under advisement, and
10 I'll issue an Opinion promptly in this instance, too.
11 Thank you. We're in recess.

12 (End of proceedings at 11:14 a.m.)
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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
5 District Court Reporter, Registered Merit Reporter,
6 Certified Realtime Reporter, and Notary Public, hereby
7 certify that the above and foregoing transcript is the
8 true, full, and complete transcript of the above-entitled
9 case, consisting of Pages 1 - 45.

10 I further certify that I am not a relative or
11 employee or attorney or counsel of any of the parties
12 hereto, nor a relative or employee of such attorney or
13 counsel, nor do I have any interest in the outcome or
14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my hand
16 this 23rd day of October, 2012.

17 /s/ Jill M. Connelly

18

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